No. 83-244

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TELEGRAPH SAVINGS AND LOAN ASSOCIATION, et al.,
Petitioners,

v.

WILLIAM J. SCHILLING, et al.,
Respondents.

and

TELEGRAPH SAVINGS AND LOAN ASSOCIATION, et al.,
Petitioners,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK BOARD AND WILLIAM J. SCHILLING,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit erred in their construction of the state closure requirement of 12 U.S.C.A. § 1729(c)(2)(A) by not reviewing the validity of the custodial taking of Telegraph Savings and Loan Association by the Illinois Commissioner of Savings and Loan Associations, thereby depriving Telegraph of property without due process of law; and

Whether the courts below erred in their conclusion that the insolvency requirement of § 1729(c)(2)(B) is the only substantive prerequisite to FHLBB and FSLIC's simultaneous seizure and liquidation of a state-chartered savings and loan association; and

Whether the courts below erred in refusing to give substantive force to the illiquidity requirement of § 1729 (c)(2)(C) and in allowing this requirement to be satisfied by a state "sham" and "farcical" "playlet."

PARTIES TO THE PROCEEDING

The following were parties to the proceeding before the United States District Court for the Northern District of Illinois, Eastern Division:

Plaintiffs

TELEGRAPH SAVINGS AND LOAN ASSOCIATION;

WILLIAM E. STRASSER; EARL C. ROSE; PETER VAN OOSTERHOUT; A.R. GROVER; on behalf of themselves and other stockholders of Telegraph Savings and Loan Association;

Defendants

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporation organized under the laws of the United States of America, in its capacity as an insurance corporation, and in its capacity as RECEIVER of the seized assets and business of Telegraph Savings & Loan Association;

UNITED STATES OF AMERICA;

FEDERAL HOME LOAN BANK BOARD, Administrative Agency of the United States Government;

JAY JANIS, member of Federal Home Loan Bank Board;

JOHN H. DOLTON, member of Federal Home Loan Bank Board;

ANDREW DI PRETE, member of Federal Home Loan Bank Board;

WILLIAM J. SCHILLING, Individually and as COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR THE STATE OF ILLINOIS;

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the judgment against Telegraph Savings and Loan Association is reported at 703 F.2d 1019 (7th Cir. 1983), (App. B). The decisions of the United States District Court for the Northern District of Illinois are unreported, (Apps. C, D, E, F, G).

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit affirming the judgment against Telegraph Savings and Loan Association was entered on March 29, 1983. A timely petition for rehearing en banc was denied on May 12, 1983. (App. A). The petition for writ of certiorari is filed within 90 days of May 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES AT ISSUE

12 U.S.C. § 1464(d)(6)(A), (C) (1976)

(6)(A) The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the

association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Such proceedings shall be given precedence over other cases pending in such courts, and shall be in every way expedited. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

. . .

(C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C.A. § 1729(c)(2), (3) (West Supp. 1983)

(2) In the event the Federal Home Loan Bank Board determines—

(A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal association) has been closed by or under the laws of any State;

(B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title,

existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole conservator or receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed conservator or receiver of an insured institution pursuant to paragraph (1) or (2)—

(A) the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal association with respect to which the Corporation had been appointed conservator or receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

STATEMENT OF THE CASE

May 22, 1980

5:15 p.m. — State Commissioner locks the doors of Telegraph Savings & Loan;
— By secret prearrangement, federal employee Bacon attempts to withdraw $25;
— State Commissioner denies Bacon's withdrawal although Telegraph holds $11 million in liquid assets.

5:16 p.m. — FHLBB seizes Telegraph.

5:17 p.m. — FHLBB appoints FSLIC receiver.

5:18 p.m. — FSLIC liquidates Telegraph's assets and liabilities.

On May 22, 1980, the Illinois Commissioner of Savings & Loan Associations ("State Commissioner"), Federal Home Loan Bank Board ("FHLBB") and Federal Savings and Loan Insurance Corporation ("FSLIC") brought to fruition a carefully orchestrated plan, conceived and developed under a veil of secrecy, whereby Telegraph Savings & Loan Association ("Telegraph") was closed, seized and liquidated in one concerted action.

At approximately 5:15 p.m. on May 22, 1980, the State Commissioner closed the business windows and locked the doors of Telegraph. Upon request from the State Commissioner, a federal employee, Raymond Bacon, attempted to withdraw $25 from his Telegraph savings account. As prearranged, the State Commissioner refused the withdrawal and thereupon concluded that an "emergency" existed pursuant to Ill. Rev. Stat. ch. 17, § 3191 (1981), (App. L).

At approximately 5:16 p.m., FHLBB seized Telegraph and moments later appointed FSLIC receiver pursuant to 12 U.S.C. § 1729(c)(2).

At approximately 5:18 p.m., FSLIC, as receiver, transferred Telegraph's liabilities, *i.e.*, its deposit accounts, to First Federal Savings & Loan Association of Chicago ("First Federal") under a purchase and assumption agreement secretly negotiated earlier. FSLIC, as receiver, transferred Telegraph's assets to FSLIC, the corporation. Simultaneously, FSLIC, the corporation, issued a check to First Federal to offset First Federal's assumption of Telegraph's liabilities. The amount of the check was far less than the value of the liabilities assumed by First Federal. Thus, by transferring liabilities that greatly exceeded the check amount, FSLIC realized a $17.5 million profit.*

On June 3, 1980, Telegraph instituted two actions to challenge the simultaneous closure, seizure and liquidation of assets and liabilities. One action was filed in state court; the other was filed in federal court.

The state action, which was filed in the Circuit Court of Cook County, was immediately removed to the United States District Court for the Northern District of Illinois, before Judge Prentice Marshall. The complaint was against the State Commissioner, FHLBB and FSLIC under state and federal law.

On June 12, 1980, Judge Marshall ruled that all claims opposing the closure, seizure and liquidation were within the exclusive jurisdiction of the federal courts. Because the federal court's removal jurisdiction was derivative from the state court's jurisdiction, Judge Marshall held that the court lacked subject matter juris-

* See Appendix H which describes the $17.5 million FSLIC profit. (App. 88).

diction and dismissed the action. *Telegraph v. Schilling*, No. 80-C-2782, mem. order (June 12, 1980), (App. G).

Later that day Telegraph filed another state court action, alleging only state law claims. On June 30, 1980, the state court, citing Judge Marshall's June 12 decision to dismiss, held that it lacked jurisdiction and dismissed the action. Telegraph appealed this dismissal. On May 25, 1983, the Appellate Court of Illinois for the First Judicial District reversed this decision to dismiss. The action is now awaiting remand to the Circuit Court.

Meanwhile, the June 3 federal action proceeded before Judge Grady. The District Court declined to decide the state law issues, stating that they should be addressed in state court.

Because the federal seizure and liquidation were based upon three statutory requirements,* the court addressed each requirement individually. First, the court granted summary judgment against Telegraph on requirements (A) and (C). *Telegraph v. FSLIC*, No. 80-C-2792, mem. ops. (June 9, 1981), (App. F), (Aug. 5, 1981), (App. E). Trial on the merits was limited to the remaining requirement (B), in which the court also ruled against Telegraph. *Telegraph*, mem. op. (Feb. 19, 1982), (App. D).

Telegraph brought a timely appeal. The United States Court of Appeals for the Seventh Circuit affirmed the District Court's decision. *Telegraph*, 703 F.2d 1019 (7th Cir. 1983), (App. B). A timely petition for rehearing en banc was denied on May 12, 1983, (App. A).

Telegraph files this Petition for a Writ of Certiorari to seek review of these decisions.

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* The three statutory requirements are included in 12 U.S.C.A. § 1729(c)(2)(A), (B), (C) (West Supp. 1983).

Any reference to "statute" refers to 12 U.S.C.A. § 1729(c)(2), (3) (West Supp. 1983) which is reproduced in "Statutes at Issue."

REASONS FOR GRANTING THE WRIT

I.

RESOLUTION OF THIS CASE IS TIMELY BECAUSE OF PRESSING ISSUES OF NATIONAL IMPORTANCE.

The Home Owner's Loan Act of 1933 reflects Congress' public policy choice to encourage private home ownership through long-term, fixed-rate mortgage loans.* Home Owner's Loan Act of 1933, ch. 64, § 5, 48 Stat. 132. The vehicle for accomplishing this home ownership objective is the savings and loan system. In order to attract funds to be reinvested in private home ownership, Congress provided for FSLIC insurance of accounts at state- and federally-chartered savings and loan associations through the National Housing Act of 1934. National Housing Act of 1934, ch. 847, 48 Stat. 1246. By providing for FSLIC insurance, the federal government created and supported the federally-insured savings and loan industry.

By Congressional design, the savings and loan industry operated at a profit for decades. Historically, savings and loan associations accepted savers' deposits and paid low interest rates which were fixed by the federal government. These deposits were then reinvested primarily in single family home mortgages. The long-term interest rates on these mortgages were likewise rela-

* Congress has reaffirmed its commitment to savings and loan associations and private home ownership many times through various statutes, including the Housing Act of 1954, Pub. L. No. 560, ch. 649, § 503(2), 68 Stat. 590, the Community Reinvestment Act of 1977, Pub. L. No. 95-128, tit. VII, § 802, 91 Stat. 1147, and the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.

tively constant over a long period of time and were higher than the short-term rates paid to depositors, thereby allowing savings and loans to earn a profit, or in financial parlance, a "positive spread."

In the mid-1970's, interest rates began to rise. "Disintermediation," *i.e.*, the outflow of funds from a bank or savings and loan into high-yielding non-bank instruments, occurred as depositors transferred funds out of traditional passbook savings accounts paying statutorily low interest rates and into non-bank money market accounts at higher interest rates. As disintermediation increased and funds rapidly bled away, savings and loans became unable to furnish new loans for the housing industry.

To make badly needed funds available to the housing industry, Congress, on June 1, 1978, authorized savings and loans to issue money market deposit instruments that offered rates of return competitive with non-bank money market accounts and other liquid investments.

At first, the effect of these money market deposit instruments was positive as savings and loans were able to prevent the outflow of funds by offering interest rates competitive with non-bank money market accounts. Savings and loans continued to be profitable so long as the interest rates paid on these instruments remained lower than the rates earned by their investment portfolios. This profitability was short-lived, however, as interest rates rocketed to unprecedented heights after 1978.

During the late 1970's, as interest rates marched higher, depositors with low-paying passbook accounts transferred huge amounts of their funds to savings and loan money market deposit instruments. While savings and loans were forced to pay these high rates to their depositors on these instruments, their source of income remained the mortgage portfolio, made up of long-term

loans, fixed at low interest rate levels. Thus, a savings and loan's "positive spread"—the source of a savings and loan's profitability—was squeezed between a fixed rate of interest earned on mortgage loans and a rapidly increasing interest rate paid on the money market deposit instruments. By the time the U.S. Treasury Bill rate reached nearly 15% in early 1980, the positive spreads enjoyed by the industry for decades had vanished; savings and loans across the country began to experience negative spreads as they were forced to pay higher interest rates than they received.

Negative spreads translated into dramatic losses for the savings and loan industry. The net worth of savings and loans across the country began to be rapidly eroded by the huge losses. Many savings and loans began to approach book value insolvency. Sometime in May, 1980, the State Commissioner concluded that Telegraph's net worth had crossed the zero point,* and although Telegraph remained highly liquid and viable,** it had become technically insolvent. On May 22, 1980, Telegraph was closed by the State Commissioner, seized by FHLBB, and immediately its assets and liabilities were liquidated by FSLIC.

At the time of seizure, Telegraph awaited a response from FHLBB on Telegraph's proposal for the infusion of $7 million in new capital conditioned upon a loan from FSLIC. *Telegraph*, mem. op. at 3 (June 9, 1981) (App. 70).

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* The State Commissioner's conclusion was based upon an arithmetic projection derived from unaudited monthly reports furnished by Telegraph to FSLIC.

** When Telegraph was seized, it had over $11 million in liquid assets and was conducting its business in its usual, and uneventful, fashion. *Telegraph*, mem. op. at 17 (June 9, 1981) (App. 84). No party alleges improper or unskilled management by Telegraph.

The District Court ruled that this alternative solution to Telegraph's declining net worth was not a part of the judicial inquiry. *Id.*, mem. op. at 7 (Aug. 5, 1981) (App. 62).

Private capital infusions were not the only solution to the problem of declining net worth. Other alternative solutions were available, including: (a) continued close monitoring of Telegraph's financial condition while allowing Telegraph to continue conducting its business in its usual, and uneventful, fashion; (b) appointment of a state receiver, not for the purpose of liquidation, to oversee Telegraph's operations pending Telegraph's return to its shareholders; and (c) FHLBB appointment of FSLIC as conservator, not for the purpose of liquidation, to oversee Telegraph's operations pending Telegraph's return to its shareholders.

Since Telegraph's seizure, the condition of the savings and loan industry has worsened. For most of the period from early 1981 to mid-1982, the U.S. Treasury Bill rate remained between 12% and 16%. Throughout 1981 and 1982, virtually every savings and loan in the United States was losing money.

In March, 1981, Director of the Office of Management and Budget, David Stockman, reported that on "any honest evaluation" basis, the equity of the savings and loan industry had been wiped out. Farnsworth, *Aid Studied for Savings Industry*, N.Y. Times, March 6, 1981, at D1, col. 6.

In 1982 and early 1983 interest rates turned downward. These lower rates, though providing the industry with breathing space, are still high by historical standards.

Although interest rates are currently below the all time highs reached in 1980-81, the spectre of high interest rates and negative spreads still shrouds the

industry. Even though many savings and loans are now generating positive spreads, a large number of savings and loans continue to be technically insolvent, and thus subject to FHLBB and FSLIC's exercise of powers under the statute.* Further, a far greater number of savings and loans currently teeter on the brink of technical insolvency and will likewise be subject to FHLBB and FSLIC's awesome statutory powers should interest rates rise once again.**

Not only are a large number of savings and loans technically insolvent or marginally solvent, but the seizure of savings and loans continues. *See, e.g., Biscayne Federal Savings & Loan Ass'n v. FHLBB*, No. 83-815-Civ-EPS (S.D. Fla. filed Apr. 6, 1983) (reviewing the seizure of a savings and loan on Apr. 6, 1983).

Therefore, this Court's review of FHLBB and FSLIC's continuing use of the statutory powers of seizure and liquidation is timely.

II.

REQUIREMENT (A)—THE STATE CLOSURE REQUIREMENT—IMPLICITLY REQUIRES A PRIOR REVIEW OF WHETHER THE STATE CLOSURE WAS VALID.

Before FHLBB may appoint FSLIC receiver of a state-chartered savings and loan pursuant to § 1729(c)(2), three requirements, (A), (B) and (C), must be met.

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* *See* Appendices I and J. Interestingly, of the 69 insolvent savings and loans listed in Appendix I, only four have had receivers or conservators appointed. (App. 89). Appendix J is a compilation of 266 savings and loans projected to be insolvent on April 15, 1983. (App. 92).

** See Appendix K which lists over 1000 savings and loans operating with less than the FSLIC required minimum net worth. (App. 98).

Requirement (A) is that "an insured institution (other than a Federal association) has been closed by or under the laws of any State[.]" 12 U.S.C.A. § 1729(c)(2)(A)(ii).

This statutory requirement has two plausible constructions. The first, advocated by FHLBB and FSLIC, and adopted by the courts below, is that the validity of the state closure is irrelevant to a judicial review of FHLBB and FSLIC's actions under the statute. *Telegraph*, 703 F.2d at 1023-25 (App. 9-12).

The second construction, advocated by Telegraph, is that the validity of the state closure under state law must be resolved before a federal court may address the propriety of the federal receivership because a valid closure under state law is a prerequisite to FHLBB's appointment of FSLIC as receiver.

In light of the mandates of the Fifth Amendment and canons of statutory construction, Petitioner respectfully prays that this Court adopt the latter construction.

A. The Lower Courts' Decisions Allow the Concerted Actions of the State and Federal Officials Under the Federal Statute to Deprive Telegraph of Its Property Without Due Process of Law.

Petitioner submits that although the state and federal statutes may be facially constitutional, the federal officials, acting in concert with state officials, applied the statutes in an unconstitutional manner to deprive Telegraph of its right to a meaningful judicial review of the simultaneous seizure and liquidation.

1. Due Process Requires an Opportunity for a Meaningful Hearing in a Meaningful Manner at a Meaningful Time.

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due

process of law[.]" U.S. Const. amend. V. Due process requires that no property be taken without "an *opportunity* . . . granted at a *meaningful time* and in a *meaningful manner* . . . for [a] hearing appropriate to the nature of the case[.]" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (citations omitted; last two emphases added). Due process generally requires that the hearing be conducted prior to the taking of property. Only in situations where this predeprivation hearing is impractical or impossible, and some valid governmental interest is at stake, may the hearing be postponed until after the taking. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Fahey v. Mallonee*, 332 U.S. 245 (1947).

A post-deprivation remedy satisfies procedural due process requirements only when the necessity of quick action or the impracticality of providing a meaningful predeprivation hearing is coupled with "the availability of some *meaningful opportunity subsequent to the initial taking* for a determination of rights and liabilities." *Parratt v. Taylor*, 451 U.S. 527, 541 (1981) (emphasis added).

The original Home Owner's Loan Act of 1933 required hearings on the propriety of imposing a receiver prior to the seizure of a savings and loan. In 1966, Congress amended the Act to allow an *ex parte* seizure of a savings and loan by FHLBB in order to prevent depositors' panic and thereby protect FSLIC's funds. Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 101(a), 80 Stat. 1028. Recognizing the need to safeguard the constitutional rights of a savings and loan seized under such an *ex parte* procedure, Congress provided for judicial review of the seizure in federal court. To make the judicial review meaningful, Congress specifically mandated that the review "be in every way expedited" to resolve all issues prior to FSLIC's liquidation and final disposition of the assets and liabilities

of a savings and loan. *Id.* (codified as amended at 12 U.S.C. § 1464(d)(6)(A) (1976)).

Petitioner contends that the federal officials acted to circumvent the procedural safeguards required by the Constitution and mandated by the statute.

2. The Pre-Planned Simultaneous Seizure and Liquidation of Telegraph Foreclosed Petitioner's Constitutional Right to a Meaningful Judicial Review and Violated Fundamental Fairness.

The 1966 amendment which allowed *ex parte* seizure by FHLBB also mandated expedited treatment of any challenges to the seizure. This expedited treatment allows resolution of challenges prior to FSLIC's liquidation of the savings and loan. Thus, an *ex parte* seizure is justified both by the need to act quickly and the availability of judicial review prior to liquidation.

In the instant case, however, FHLBB and FSLIC conspired with the state officials to close Telegraph, to have FHLBB seize Telegraph under § 1729(c)(2) and appoint FSLIC receiver, and to have FSLIC liquidate Telegraph's assets and liabilities—all within minutes. In this fleeting moment, FHLBB and FSLIC circumvented the statute's procedural due process safeguard of an expedited judicial review prior to liquidation.

The due process standard to be applied in evaluating a judicial or administrative procedure is one of "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). In determining what "fundamental fairness" requires, this Court has adopted a fact-specific balancing approach that requires consideration of three factors: first, the private interest that will be affected by the government action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or

substitute safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute proceedings would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The first due process factor is the private interest asserted by Telegraph. Telegraph's interest is one of constitutional force—protection from deprivation of property without due process of law. Specifically, FHLBB and FSLIC's simultaneous seizure and liquidation deny Telegraph the right to a meaningful judicial review prior to liquidation.

The second due process factor requires examination of the risk of erroneous deprivation and the probable value of additional safeguards. Since any deprivation under the draconian act of seizure and liquidation without notice may be erroneous, meaningful judicial review is mandated both by the Constitution and the statute.

The probable value of requiring FSLIC to abstain from liquidating a seized savings and loan pending completion of the constitutionally mandated judicial review is also great. A statutory construction that requires a judicial review prior to FSLIC liquidation allows a seized savings and loan that successfully challenges the federal agencies to regain control of its business.*

The third due process factor is the government's interest in maintaining the present procedure. Petitioner contends that the federal agencies have no rationale sufficient to warrant liquidation of the assets and liabilities of a seized savings and loan prior to adjudication of all challenges under the statute.

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* *See, e.g., Elliot v. FHLBB*, 233 F. Supp. 578 (S.D. Cal. 1964) (describing the Long Beach Savings and Loan litigation in which seizure of a savings and loan was twice overturned, and the savings and loan was returned to the shareholders).

Once FSLIC has been appointed receiver, the possibility of depositor panic and of the resulting run on the institution—the rationale for an *ex parte* seizure—has been averted. Moreover, once FSLIC has been appointed receiver, the possibility of a state-appointed receiver jeopardizing FSLIC's reserve fund—the rationale for appointing FSLIC receiver—has also been averted. The only possible remaining reason is that early liquidation is more convenient for FSLIC. Mere administrative convenience, however, clearly does not warrant liquidation of seized property prior to judicial review. *Fuentes v. Shevin*, 407 U.S. 67, 90 n. 22 (1972); *Bell v. Burson*, 402 U.S. 535, *conformed to*, 124 Ga. App. 220, 183 S.E.2d 416 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

As this Court specifically stated in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Id. at 656 (footnote omitted).

Therefore, Petitioner respectfully prays that this Court grant a Writ of Certiorari to resolve these issues of constitutional importance.

3. By Construing the Statute to Allow an Illegal Closure to Trigger Liquidation of a Savings and Loan, the Lower Courts Erroneously Violated Petitioner's Right to Substantive Due Process and a Meaningful Judicial Review.

In construing the requirement that "an insured institution (other than a Federal association) has been closed

by or under the laws of any state," both courts below ruled that the validity of the state closure was irrelevant to the adjudication of suits under the statute. *Telegraph*, 703 F.2d at 1023-25 (App. 9-12); mem. op. at 8 (Aug. 5, 1981) (App. 63). Petitioner respectfully submits that the lower courts erred in this construction of the statute because such a construction violates Petitioner's right to substantive due process and a meaningful judicial review.

The lower courts' construction that the validity of the closure is irrelevant necessarily means that an improper or illegal closure under state law would suffice to trigger FSLIC liquidation of a savings and loan under the statute. Such a result is repugnant to fundamental fairness and flies in the face of substantive due process.

In determining whether due process requirements have been met, this Court traditionally has looked to substance rather than form. *Frank v. Mangum*, 237 U.S. 309 (1915). When the necessary result of a statute is to deprive a person of his property without compensation illegally or arbitrarily, the mere form of the proceeding cannot convert the process used into due process of law. *Cf. Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild*, 224 U.S. 510 (1912). Therefore, the lower courts erred in their conclusion that the validity of the state closure is irrelevant to an adjudication of a challenge under the statute.

The lower courts' construction of the statute has, to date, operated unconstitutionally to deprive Telegraph of any meaningful remedy. Refusal to adjudicate the validity of the state closure in federal court relegates Telegraph to its remedy in state court. The nature and extent of the state remedy, however, are unclear. The Attorney General of Illinois asserts that the Illinois sta-

tute provides only injunctive relief and does not allow damages: "[Section] 7-12 of the Illinois Savings and Loan Act plainly and unmistakably does not allow for a damages action." Brief for Appellees at 23, *Telegraph Savings and Loan Ass'n v. Schilling*, No. 80-2153 (Ill. App. Ct., May 25, 1983).

Injunctive relief would provide Telegraph with but a hollow remedy for two reasons. First, the great bulk of the assets and liabilities of Telegraph have already been liquidated, and the state court can no longer completely unwind the transaction. Second, even if the state court could completely unwind the transaction, 12 U.S.C. § 1464(d) may preclude the state court from exercising any authority over FSLIC's receivership.*

Thus, by denying a forum in which to grant a meaningful remedy, the lower courts' construction of the statute creates a jurisdictional gap in which no meaningful remedy exists for the illegal state closure and simultaneous federal liquidation of the assets and liabilities of a savings and loan.

Additionally, use of the three factor balancing approach set forth in *Mathews* shows that the lower courts' construction does not comport with fundamental fairness.

This first due process factor under *Mathews* is the private interest to be asserted. Petitioner's interest is one of constitutional force: the right to be protected from illegal government seizure of private property.

The second factor requires examination of the risk of erroneous deprivation and the probable value of addition-

* Section 1464(d)(6)(C) specifically provides that: "Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. § 1464(d)(6)(C) (1976).

al safeguards. The lower courts construe the validity of the state closure to be irrelevant to a review of the federal agencies' actions. Under the lower courts' construction, an illegal closure at the state level would warrant simultaneous seizure and liquidation at the federal level. The risk that such a deprivation would be erroneous is great.

The probable value of the additional safeguard, prior judicial review, is also great. A prior judicial review of the state closure's validity avoids the risk that FSLIC could hold and liquidate a savings and loan that was illegally closed by the state.

The final due process factor is the government's interest in maintaining the lower courts' construction of the statute. The government has demonstrated no compelling reason to preclude a prior review of the state closure. Petitioner contends that the only government interest in maintaining this construction of the statute is administrative convenience. Such an interest does not justify the lower courts' construction. *Stanley v. Illinois*, 405 U.S. at 656.

Therefore, due to the constitutional magnitude of the private interest at risk, the high value of a prior review of the state closure, and the lack of a compelling government interest in precluding such a review, the lower courts' construction of the statute does not comport with fundamental fairness as required by due process.

For these reasons, Petitioner respectfully prays that this Court grant a Writ of Certiorari to resolve these issues of constitutional importance.

B. Petitioner's Statutory Construction Avoids Constitutional Questions, Follows Congressional Intent, and Adheres to Canons of Statutory Construction.

Petitioner contends that the statute must be construed to require judicial review of the validity of the state closure before a federal court may address the propriety of the federal receivership. This prior judicial review is necessary because a valid closure under state law is a prerequisite to FHLBB's appointment of FSLIC as receiver.

1. Petitioner's Statutory Construction Avoids Constitutional Questions.

Petitioner's construction avoids constitutional questions and simply requires a court to decide the validity of the state closure as part of its inquiry into FHLBB and FSLIC's compliance with the statute.

Under Petitioner's construction, if a court finds the state closure to be invalid, the judicial inquiry ends, since one of the necessary requirements for appointment of FSLIC as receiver remains unfulfilled. On the other hand, if a court finds the state closure to be valid, the judicial inquiry into FHLBB and FSLIC's compliance with the statute continues. Since a court will have reviewed the validity of the state closure prior to any final disposition of the seized property, this procedure will not violate due process. Thus, FHLBB and FSLIC's construction presents serious constitutional issues for this Court to decide; Petitioner's construction avoids constitutional issues.

Petitioner's construction also avoids the inequitable jurisdictional gap which may deny Petitioner a meaningful remedy. Since valid closure of the institution under state law is a prerequisite to federal seizure under

this construction, validity of the state closure is included in the federal question. Thus, a federal court would not have the discretion to refuse to hear the closure issue, and Petitioner would have the opportunity for a meaningful hearing.

2. Petitioner's Construction Follows Congressional Intent.

In 1968, Congress amended the statute "to enable the FSLIC to effect an orderly disposition of the assets of insured associations *whose depositors have been reimbursed by FSLIC insurance payments.*" S. Rep. No. 1263, 90th Cong., 2d Sess. 1, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2530, 2531 (emphasis added) ("S. Rep."). Congress enacted this legislation to protect FSLIC's funds and to avoid the hardship caused to depositors by the Marshall Savings and Loan Association crisis.* Congress did not intend, however, that FHLBB use this authority with impunity. The Senate Committee on Banking and Currency specifically stated that "the authority would not be used unless timely insurance payments were needed to preserve public confidence in savings and loan associations or that the inability to obtain withdrawals worked an undue hardship on the savers in the association." *Id.* at 11, 1968 U.S. Code Cong. & Ad. News at 2538.

Petitioner's construction follows these Senate guidelines. FSLIC has not reimbursed any Telegraph depositor, nor did it need to intervene to preserve public

* On December 31, 1964, Marshall Savings and Loan Association was placed in state custody, but a receiver for the purpose of liquidation was not appointed until April 8, 1965, thereby first triggering FSLIC insurance payments. In the interim, savings account holders were unable to withdraw any funds.

confidence. Immediately prior to FSLIC's seizure, Telegraph had $11,000,000 in liquid assets; only a public panic, followed by a run on the institution, could have caused any drain on the insurance fund or caused any hardship to depositors. Not even FSLIC pretends that such an event was likely. Thus, FHLBB and FSLIC's seizure of Telegraph does not conform to the broad purposes of the legislation, whereas Petitioner's statutory construction follows Congressional intent.

3. Petitioner's Construction Adheres to Canons of Statutory Construction.

This Court often has held that constitutional questions should only be decided when absolutely necessary. As Mr. Justice Brandeis stated:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

Ashwander v. TVA, 297 U.S. 288, 341 (1936).

In the present case, Petitioner's statutory construction avoids the necessity of deciding a difficult constitutional question. FHLBB and FSLIC's construction, on the other hand, squarely presents a difficult due process question—the constitutionality of a simultaneous seizure and liquidation of property without a meaningful judicial review.

In addition, this Court has consistently maintained that a statute should be construed so as to hold it constitutional. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). "In particular, this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit

statutory language to the contrary." *Id.* The lower courts' construction of the statute, which unconstitutionally insulates the validity of the state closure from meaningful judicial review, ignores this Court's mandate; Petitioner's construction follows this mandate.

For this reason, Petitioner respectfully prays that this Court grant review of the present case to clarify the meaning of the statute.

III.

THE LOWER COURTS ERRED IN THEIR CONCLUSION THAT REQUIREMENT (B)—THE INSOLVENCY STANDARD—IS THE ONLY SUBSTANTIVE REQUIREMENT FOR FHLBB SEIZURE AND FSLIC RECEIVERSHIP.

Before FHLBB may seize a savings and loan and appoint FSLIC receiver, FHLBB must meet the three substantive requirements, (A), (B) and (C), of § 1729(c)(2); each of these requirements must be given independent substantive meaning.* The lower courts' analysis ignores the substantive elements of requirements (A) and (C),** leaving only requirement (B). Due to the dramatic instability of interest rates, however, requirement (B) and its insolvency standard have little or no relevance to the savings and loan industry.

In 1954, Congress enacted the present insolvency standard for a receivership of federally-chartered savings and

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* Requirements (A), (B) and (C) are independent because the statute is written in the conjunctive.

** The Seventh Circuit read requirements (A) and (C) out of the statute by its statement: "The withdrawal requirement, like the closure precondition, is, under the circumstances here, 'substantially a ceremonial formality.'" *Telegraph*, 703 F.2d at 1026 (App. 14) (citation omitted).

loan associations and chose the then relevant book value insolvency standard. Housing Act of 1954, Pub. L. No. 560, ch. 649, § 503(2), 68 Stat. 590. This book value insolvency standard presupposes stable interest rates because book values only reflect fair market values when interest rates are stable. During the period of law and stable interest rates of the 1950's, the book value insolvency standard continued to be meaningful.

As interest rates began to climb in the late 1960's and early 1970's, however, the underlying premise of the book value insolvency standard was shaken. In the late 1970's when interest rates began to fluctuate wildly, the relevance to the savings and loan industry of book value insolvency was shattered. Telegraph introduced testimony of the highest order from the Assistant Secretary of the Treasury for Domestic Finance, the senior domestic financial officer of the United States Government, Roger W. Mehle, who explained the widely held opinion that in today's economy the book value insolvency standard is arbitrary and unreasonable and has no economic meaning.*

Against this background of a nearly irrelevant insolvency standard, however, the lower courts construed the statute to have only one substantive requirement—the questionable insolvency standard. Petitioner contends that this statutory construction is clearly erroneous.

This Court consistently has mandated that statutes must be construed to give effect to each section. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). By ignoring two

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* Although Mr. Mehle did not appear in his official capacity, he stated that he had presented the same testimony on behalf of the Treasury Department before the Senate Committee on Banking and Currency a few weeks earlier. Trial Record at 488.

congressionally-tailored and explicit requirements and by using a standard which had little or no relevance to the savings and loan industry at the time it was applied, the lower courts deprived Telegraph of its property without due process of law.

IV.

REQUIREMENT (C)—THE ILLIQUIDITY REQUIREMENT—IS A SEPARATE AND DISTINCT STATUTORY REQUIREMENT THAT MAY NOT BE SATISFIED BY A STATE AND FEDERALLY ORCHESTRATED "SHAM" AND "FARCICAL" "PLAYLET."

Requirement (C) is an illiquidity requirement that is fulfilled when depositors are unable to obtain a withdrawal. The State Commissioner, FHLBB and FSLIC attempted to fulfill this requirement by having a federal employee, Raymond Bacon, act as a strawman and attempt to withdraw $25 from Telegraph. When Bacon presented his withdrawal request to a teller, the State Commissioner interceded and denied Bacon's request on behalf of Telegraph. Thus, Telegraph was closed, seized and liquidated for want of $25 at a time when it held over $11 million in liquid assets.

Requirement (C)—the illiquidity requirement—was specifically added by Congress to require "the Board to find that the shareholders* are unable to obtain a withdrawal of their savings in whole or in part." S. Rep. at 12, 1968 U.S. Code Cong. & Ad. News at 2541. This requirement precludes a FSLIC receivership when a state-chartered savings and loan association is liquid and continues to honor all withdrawal requests. Congress added requirement (C) to protect private property from government

* Savings and loan association depositors often are referred to as "shareholders."

seizure, and this requirement may not be satisfied by a state official's staged refusal to honor a single prearranged strawman's withdrawal request.*

On May 3, 1968, S. 3436, the bill which became § 1729(c)(2), was introduced in the Senate to provide for the appointment of FSLIC as a receiver for failing state-chartered savings and loan associations. This bill, as originally introduced in the Senate, would have permitted FSLIC to be appointed receiver if only two conditions were met:

> (1) a receiver or custodian must be appointed under State law (or the association must be closed under State law); and
>
> (2) the [Federal Home Loan Bank] Board determines such an appointment would be advisable in the public interest.

Id. at 11, 1968 U.S. Code Cong. & Ad. News at 2541. The "advisable in the public interest" standard was vigorously attacked in the subsequent May 20 hearing before the Senate Committee on Banking and Currency. This standard was criticized as a "pliable and illusory standard" allowing FSLIC to invoke an "arbitrary power." *Savings and Loan Receiverships: Hearings Before the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 37-38 ("*Senate Hearings*"). Under the proposed bill, "judicial review on the merits for institutions taken over would be virtually nonexistent." *Id.* at 64. Interested parties whose statements were included in the *Senate Hearings* were overwhelmingly opposed to this illusory standard.**

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* The Seventh Circuit read requirement (C) out of the statute by labeling it a "ceremonial formality." *Telegraph*, 703 F.2d at 1026 (App. 14) (citation omitted).

** Fifteen parties opposed the proposed bill, whereas only four supported it.

Additionally, Senator Bennett was concerned "that State authority not be overruled except where absolutely necessary." *Id.* at 19 (quoting Chairman Sparkman). Several parties, including Senator Bennett, offered amendments that would have imposed additional requirements before FHLBB might appoint FSLIC receiver. *See, e.g., Senate Hearings* at 19, 66-68.

Because of this overwhelming opposition to the "advisable in the public interest" standard, the Senate Banking Committee replaced this standard with two objective requirements. First, the Committee replaced the "advisable in the public interest" standard with the present requirement (B). This requirement provides that before FHLBB may appoint FSLIC receiver for a state savings and loan association, one of the same grounds must exist that allow the appointment of FSLIC as receiver for a federal association under 12 U.S.C. § 1464(d)(6)(A), of which "insolvency" is alleged in the present case. Second, the Committee added the present requirement (C): that the association's depositors "are unable to obtain a withdrawal of their savings in whole or in part." S. Rep. at 12, 1968 U.S. Code Cong. & Ad. News at 2541.

These amendments were added and later enacted by Congress because the committee warned that the original "delegation would be too broad and would afford virtually no substantive judicial review." *Id.* at 11-12, 1968 U.S. Code Cong. & Ad. News at 2541. Thus, the Senate Banking Committee included requirements (B) and (C) to impose two additional substantive requirements that must be fulfilled before FHLBB may appoint FSLIC receiver.

Requirement (C)—"that one or more of the holders of withdrawable accounts in such [savings and loan] institution is unable to obtain a withdrawal of his account in

whole or in part"—was added by the Congress to protect depositors against the event of a savings and loan's lacking sufficient funds to honor legitimate withdrawal requests.

Specifically, this requirement was enacted to prevent another Marshall Savings and Loan situation in which savers were refused any withdrawals for 3½ months and "had no means of obtaining their savings." S. Rep. at 11, 1968 U.S. Code Cong. & Ad. News at 2540.

Requirement (C) is not fulfilled, however, when a state banking commissioner closes a savings and loan association and refuses a strawman's request for a $25 withdrawal from an association that has $11,000,000 in liquid assets. As the District Court declared below, this staged request and refusal is a "playlet . . . [that] borders on the farcical." *Telegraph*, mem. op. at 17 (June 9, 1981) (App. 85).

This agency action also flies in the face of Congress' careful limitation of federal intrusion into the affairs of state-chartered savings and loan associations.

Further, the lower courts' construction of the statute, which allows an arbitrary, "farcical" "playlet" to trigger the simultaneous seizure and liquidation of a savings and loan, violates Petitioner's due process right to be free from arbitrary and capricious government actions. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

Congress specifically added requirement (C) to allow FHLBB to appoint FSLIC receiver when "large numbers of shareholders are unable to withdraw their funds from a failing association[.]" S. Rep. at 11, 1968 U.S. Code Cong. & Ad. News at 2540; 114 Cong. Rec. 18299 (1968) (statement of Rep. Patman). State and federal agents, however, attempted to fulfill this requirement by play-

ing out a "sham"* on the floor of Telegraph. Thus, the lower courts allow FHLBB and FSLIC to deprive Telegraph of its property without due process by accepting this "sham" and "farcical" "playlet" to fulfill substantive statutory requirement (C).

Because the decisions below allow this unconstitutional simultaneous seizure and liquidation of private property, this Court should review the decisions to resolve difficult and important issues of first impression.

CONCLUSION

To resolve these constitutional and statutory issues of national importance, Telegraph prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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* State Commissioner's general counsel, Paula Hiza, in her handwritten notes of a May 1, 1980 planning session with the State Commissioner, FHLBB and FSLIC labeled the staged withdrawal request a "sham." Reproduced in Brief of Plaintiffs-Appellants at Add. 1.